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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

D.S., Petitioner, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; ORANGE COUNTY SOCIAL SERVICES AGENCY, Real Party in Interest.	G041451 (Super. Ct. Nos. DP010163, DP016806 & DP017437) O P I N I O N

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, Julian Bailey, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Petition denied.

Lawrence A. Aufill for Petitioner.

Benjamin P. de Mayo, County Counsel, Karen L. Christensen and Jeannie Su, Deputy County Counsel, for Real Party in Interest Orange County Social Services Agency.

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D.S. seeks extraordinary relief from the orders of the juvenile court referring the dependency proceedings regarding her three younger children, V.S., A.S. and S.S., to a permanent plan selection hearing. She challenges the jurisdictional finding as to A.S.; she challenges the order denying her reunification services as to all three of the children. We find the orders are supported by substantial evidence and deny the petition.

FACTS

In March 2008, V.S. was found wandering alone in a "high traffic area" near the intersection of Harbor Boulevard and South Street in Anaheim. V.S., a few weeks short of his fourth birthday, and A.S., his 23-month-old sister, had been left in the care of their 84-year-old maternal grandfather because their parents were incarcerated. The grandfather had left A.S. alone after he discovered V.S. was missing and went to look for him. The maternal grandfather had mental and physical health issues and had been deemed unreliable as a caretaker for the children as early as 2001. V.S. had been found wandering alone several times before while in the care of his maternal grandfather and his parents. V.S. and A.S. were detained and placed in Orangewood Children's Home.

The father, J.S., had a lengthy history of arrests and convictions for domestic violence and drug-related activities. The mother also had a history of arrests and convictions, including convictions for grand theft, passing a check with nonsufficient funds, possession of a controlled substance, and various probation violations. Her recent arrests were in January 2008 for possession of a controlled substance and in March 2008 for a probation violation.

The mother and the father had four older children who were born between August1996 and December 2002. The parents were provided non-court family maintenance services for six months in 1998 and again for six months in 2001 to address issues of neglect, poor supervision, and drug use by the father. Notwithstanding, the four children were detained in February 2003 and made dependents of the juvenile court in April 2003; parental rights to these children were terminated in August 2005.

V.S. was born in April 2004, during the dependency proceedings regarding his four older siblings. A petition was filed on his behalf and he was declared a dependent of the juvenile court, but he was left in the care of the mother with family maintenance services. In April 2005, V.S. was removed from her custody for several days because he and the mother were in the car with the father when he was arrested for possession of methamphetamines. "The child was in the back seat with no car seat and restrained by the seat belt only." The father admitted he used methamphetamine daily, and the mother admitted she suspected his drug use. After V.S.'s return to the mother, she "continued to attend therapy and meet with the assigned Social Worker" and "appeared to be protective of the child and met all of his daily needs, as well as his medical needs." Jurisdiction was terminated in November 2005, with sole physical custody to the mother. The father was allowed one two-hour monitored visit with V.S per month, but the mother was not permitted to be the monitor.

The mother began drug testing and attending a parenting education program and substance abuse program pending the jurisdiction hearing for V.S. and A.S. Her drug tests were negative until early May 2008, when she tested positive for cocaine. This constituted a probation violation, and she was incarcerated from May 13 to July 31, 2008. The jurisdiction hearing was held on June 11, during the mother's period of incarceration. She was transported to the hearing and pleaded nolo contendere to the petition. The court found V.S. and A.S. came under the jurisdiction of the juvenile court pursuant to Welfare

and Institutions Code section 300, subdivisions (b) [failure to protect], (g) [abandonment], and (j) [abuse of sibling].[1]

The mother was released on July 31 with the probation condition that she live apart from the father. After she was released, the mother called the social worker and demanded a referral to Alta Institute for services, which is where she had gone before her incarceration. Subsequently, she demanded that the social worker contact Alta Institute and excuse her absences that were incurred while she was incarcerated. The social worker explained to the mother that she had been referred to Olive Crest for parenting education, which was scheduled to begin the next day, but the mother wanted to complete her programs only through the Alta Institute "as it was all in one location and she would save money on gas," even though she would have to wait to begin the programs. The mother agreed to undergo random drug testing through MEDTOX.

On August 19, the mother's probation officer told SSA the mother had reported she had given birth to a baby girl earlier that month and had sent the child to Mexico to live with her brother. A social worker and the police went to the paternal grandparents' house, where the mother was staying with the father and an infant baby girl, on August 25. The mother initially denied the child was hers, but finally admitted she had given birth to S.A. on August 9. S.S. was detained, and a petition was filed on her behalf, alleging sibling abuse and failure to protect due to the mother's positive test for cocaine during the pregnancy.

The mother drug tested regularly between August and December 2008. All her tests were negative. She reenrolled in Alta Institute's Chemical Dependency Intervention Program (CDIP) on August 21 and attended some of the sessions. She was terminated from CDIP in December for absences. In September 2008, V.S., A.S. and

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[1] All statutory references are to the Welfare and Institutions Code.

S.S. were placed with D.B. and K.B., the family that adopted the four older siblings in 2006.

The jurisdiction hearing for S.S. and the disposition hearing for all three children began on December 16, 2008 and ended on January 5, 2009. The mother testified she had never used drugs and blamed her convictions on the father. She could not explain the positive drug test for cocaine. "I don't know how they could say that I tested positive for that when I know for a fact that I don't use, and I will never, ever use anything like that."

The court found the mother had an unresolved drug problem and that she "lacks credibility." It also found by clear and convincing evidence that she had not made a reasonable effort to treat the problems that led to the removal of the siblings. The court further found that ordering reunification services would not be in the best interest of the children. "[T]hese children are in a really remarkable situation as far as I can see. . . . [¶] [T]his family has already absorbed through adoption the first four children, and have now accepted placement [of the next three]. And, apparently, the children are doing quite well . . . with that adoptive family."

DISCUSSION

The mother first challenges the finding that S.S. comes within the jurisdiction of the juvenile court. She claims there is no substantial evidence to support the finding of substantial risk of harm to S.S., which is required for jurisdiction under both subdivision (b) and subdivision (j) of section 300.

Section 300, subdivision (b) describes a child who "has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child . . . or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse." Subdivision (j) describes a child whose "sibling has been abused or

neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions."

"While evidence of past conduct may be probative of current conditions, the question under section 300 is whether circumstances *at the time of the hearing* subject the minor to the defined risk of harm. [Citations.] Thus the past infliction of physical harm by a caretaker, standing alone, does not establish a substantial risk of physical harm; '[t]here must be some reason to believe the acts may continue in the future.' [Citations.]" (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824, fn. omitted.) The standard of proof for a finding of dependency jurisdiction is preponderance of the evidence. (*In re Jennifer V.* (1988) 197 Cal.App.3d 1206, 1211.) We will uphold the jurisdiction findings if they are supported by substantial evidence. (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193.)

The mother points out that S.S. was born healthy with no apparent side effects from the mother's drug use. SSA reported the child was "well groomed and appropriately dressed" and "had no observable marks or bruises on her body" when she was detained by the social worker. The mother's random drug tests had all been negative, and she was not in violation of her probation. She claims SSA had no substantial evidence S.S. was currently at risk.

The record contains substantial evidence to support the findings. The mother tested positive for cocaine while she was pregnant with S.S. and was consequently incarcerated for two and one-half months. When released, she was ordered not to live with the father, but she violated that order. Furthermore, the mother did not challenge the allegations of the petitions on behalf of V.S. and A.S., which were found true less than two months before S.S. was born. These allegations described behaviors similar to those found true five years before, when the four older siblings were adjudicated dependents, and included the toxic association with her husband, criminal activity and incarcerations, and failure to supervise her children. Given these long-

standing patterns of behavior undertaken by the mother with her six previous children, the juvenile court could reasonably infer there was a substantial risk of serious physical harm or illness to S.S.

The mother next challenges the juvenile court's refusal to provide her with reunification services as to V.S., A.S., and S.S.; she contends she proved she had made a reasonable effort to treat the problems that led to the removal of her four older children. We disagree.

"The goal of the juvenile dependency system is the preservation of the family, whenever possible. To this end, parents whose children are removed from their custody are offered services designed to eliminate the conditions leading to loss of custody and to facilitate reunification of parent and child. The Legislature has recognized, however, 'that it may be fruitless to provide reunification services under certain circumstances' set forth in section 361.5, subdivision (b). [Citation.]" (*Raymond C. v. Superior Court* (1997) 55 Cal.App.4th 159, 163.) Here, the juvenile court denied reunification services to the mother under section 361.5, subdivisions (b)(10) and (b)(11).

Section 361.5, subdivision (b)(10) provides that the juvenile court need not offer services to a parent where "the court ordered termination of reunification services for any siblings . . . of the child because the parent . . . failed to reunify with the sibling . . . after [removal] from that parent . . . and that, according to the findings of the court, this parent . . . has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling . . . ." Section 361.5, subdivision (b)(11) likewise authorizes the denial of services where "the parental rights of a parent over any sibling . . . of the child had been permanently severed, and this parent is the same parent described in subdivision (a), and that, according to the findings of the court, this parent has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling . . . from the parent."

The mother contends she made reasonable efforts to treat the problems that led to the removal of her four older children, as evidenced by her successful reunification with V.S. in November 2005. She cites *Renee J. v. Superior Court* (2002) 96 Cal.App.4th 1450, where this court noted, "[T]he 'reasonable effort to treat' standard found in former subdivision (b)(10) (now subd. (b)(10) and (11)) is not synonymous with 'cure.'" (*Id.* at p. 1464.)

The standard of proof for findings bypassing reunification services is clear and convincing evidence. (§ 361.5.) """The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal." [Citations.]' [Citation.] Thus, on appeal from a judgment required to be based upon clear and convincing evidence, 'the clear and convincing test disappears . . . [and] the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong.' [Citation.]" (*In re Angelique C.* (2003) 113 Cal.App.4th 509, 519.)

There is substantial evidence in the record to support the trial court's finding that the mother did not make reasonable efforts to treat the problems that led to the removal of her four older children. Despite years of services, she repeated the same neglectful behavior with V.S. and A.S. that she had exhibited with the older children. She left her children with an unsafe caretaker, she engaged in criminal activity resulting in her incarceration, and she continued to associate with the father, who was a long-term drug addict and a negative influence in her life. Since V.S. and A.S. were detained, her participation in services was inconsistent. Although most of her drug tests were negative, she tested positive for cocaine while pregnant with S.S. She missed scheduled appointments and was terminated from her programs for too many absences. Unfortunately, her success in 2005 becomes less significant when viewed in the context

of her behavior over the longer term. (See *In re Baby Boy H.* (1998) 63 Cal.App.4th 470, 474-475.)

DISPOSITION

The orders declaring S.S. a dependent of the juvenile court and refusing to provide reunification services to the mother for V.S., A.S. and S.S. are correct. Accordingly, we deny the petition.

SILLS, P. J.

WE CONCUR:

BEDSWORTH, J.

O'LEARY, J.